

ARKANSAS COURT OF APPEALS
ROAF, JUDGE ANDREE LAYTON
NOT PUBLISHED

DIVISION IV

CA06-394

October 25, 2006

CAVENAUGH AUTO GROUP and
RISK MANAGEMENT RESOURCES

APPELLANTS

v.

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F409570]

MICHAEL L. WORTHINGTON

APPELLEES

AFFIRMED

This is a workers' compensation case, and the sole issue is whether substantial evidence supports the Arkansas Workers' Compensation Commission's decision that appellee Michael Worthington is entitled to temporary total disability (TTD) benefits from July 13, 2004, to a date yet to be determined. We affirm.

Worthington sustained a compensable injury to his right knee on July 3, 2004, when he slipped on some oil or water while he was employed as a car salesman for appellant Cavanaugh Auto Group. Worthington's salary before his injury was based upon his car sales. If Worthington did not earn enough in monthly commissions, he would be paid minimum wage. His duties before his injury included walking out to the lot to meet new customers, discussing and demonstrating vehicles in an effort to make sales, and taking offers and other applications

necessary to conclude a sales contract. Appellants Cavanaugh Auto Group and Risk Management Resources (collectively referred to as “Cavanaugh”) paid all medical expenses and paid temporary total disability benefits until July 12, 2004, when Worthington was released to return to work with the restriction that he had to use a knee immobilizer and crutches.

Worthington was initially examined and treated at the St. Bernard’s Regional Medical Center emergency room on July 5, 2004. He was diagnosed as having sustained a dislocation of the right knee with internal derangement. He was instructed to rest, apply ice, and take prescription medications. He was discharged on crutches and instructed to follow up with Dr. John Ball, an orthopedic surgeon. According to Worthington, he went to Dr. Ball’s office but was not permitted to be evaluated by Dr. Ball because he was informed that he had to see the company doctor.

Bobby Long, the human resource manager, referred Worthington to the company doctor, Dr. Arnold Gilliam. Dr. Gilliam examined Worthington on July 8, 2004. According to Worthington, Dr. Gilliam did not even look at Worthington’s knee but told Worthington that he could return to work on July 12, 2004, just days after the injury, with the restriction that he must use a knee immobilizer and crutches. According to Worthington, he did not return to work because he could not walk or drive at that time.

Worthington was not satisfied with his visit to Dr. Gilliam, and he first attempted to utilize the VA hospital in Memphis, Tennessee, for an evaluation and treatment. The doctor at the VA hospital recommended an MRI of Worthington’s knee. According to Worthington, because of a backlog of patients, he could not get an appointment for an MRI at the VA hospital for several months. Eventually, Worthington petitioned the Commission for a change of treating

physician to Dr. Bud Dickson, an orthopedic surgeon, and the Commission allowed the change of physician.

Dr. Dickson first evaluated Worthington on June 22, 2005, more than one year after the injury. Worthington underwent an MRI of the right knee, and Dr. Dickson concluded that Worthington needed surgery to correct the damage to his knee, which was a medial meniscus tear. Cavanaugh forwarded Worthington's medical records to another orthopedic surgeon, Dr. James Mulhollan, who confirmed the need for knee surgery. Cavanaugh then accepted responsibility for the recommended surgery.

Bobby Long testified that, based on Dr. Gilliam's release to return to work, Cavanaugh sent Worthington a letter on July 12, 2004, that requested Worthington to present a work excuse for every day that he could not be at work after July 11, 2004. The letter stated that if Cavanaugh did not have the excuse in its human resource office by July 19, 2004, it would assume that Worthington had willfully and voluntarily resigned his position. Cavanaugh further stated in the letter that it was aware of Worthington's restrictions and that it could provide Worthington with work that would accommodate the restrictions. Long testified that after Cavanaugh sent the letter to Worthington, Worthington did not contact Long. Long further testified that Cavanaugh planned to return Worthington to his sales position but would have accommodated his restrictions.

Worthington testified that he received the letter from Cavanaugh but did not return to work because the condition of his knee kept him from being able to drive the twenty-six-mile distance from his home to Cavanaugh. According to Worthington, after his injury, he first began to drive again in October 2004. According to Worthington, he contacted Long and told Long that

he (Worthington) could not return to work because he could not drive. Worthington could not remember if he told this to Long before or after he received the letter from Cavanaugh.

The administrative law judge (ALJ) and the Commission concluded that Worthington was entitled to TTD benefits beginning July 13, 2004, to a date yet to be determined. Cavanaugh appeals from the Commission's decision.

In reviewing decisions from the Workers' Compensation Commission, this court views the evidence and all reasonable inferences in the light most favorable to the Commission's findings, and we affirm if substantial evidence supports the decision. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). Substantial evidence exists if reasonable minds could reach the same conclusion. *Id.* "The determination of the credibility and weight to be given a witness's testimony is within the sole province of the Commission." *Farmers Co-op v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002). The Commission is not required to believe the testimony of the claimant or any other witness, and it may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Id.* The Commission has the duty of weighing medical evidence, and the resolution of conflicting evidence is a question of fact for the Commission. *Stone v. Dollar Gen. Stores*, 91 Ark. App. 260, ___ S.W.3d ___ (2005).

Cavanaugh argues as its sole point on appeal that the Commission's decision that Worthington was entitled to TTD benefits is not supported by substantial evidence. Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages *Biles, supra*. The healing period is that period for healing of an accidental injury that continues until the employee is as far restored as the permanent character of his injury will permit, and the healing period ends when the underlying condition causing the

disability has become stable and nothing in the way of treatment will improve that condition. *Id.* When an injured employee is totally incapacitated from earning wages and remains in his healing period, he is entitled to temporary total disability. *KII Constr. Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002).¹

Cavanaugh asserts that Worthington is not entitled to TTD benefits because he refused to accept suitable employment pursuant to Ark. Code Ann. § 11-9-526 (Repl. 2002). Arkansas Code Annotated section 11-9-526 states that any injured employee who refuses offer of employment suitable to his or her capacity shall not be entitled to any compensation during the continuance of the refusal, unless the refusal is justifiable. Here, the company doctor, Dr. Gilliam, released Worthington to return to work days after his injury on July 12, 2004, with specific restrictions that Worthington use a knee immobilizer and crutches.

Long, Cavanaugh's human resources director, sent a letter on behalf of Cavanaugh to Worthington stating that it could provide Worthington with work to accommodate his restrictions. Worthington testified that he could not return to work on July 12, 2004, because the right knee immobilizer prevented him from bending his knee and thus also prevented him from being able drive to work. Worthington lived twenty-six miles from Cavanaugh. Worthington also could not walk without the aid of crutches. There was conflicting evidence as to whether Worthington notified Cavanaugh that he could not drive to work. Long testified that Worthington never notified him, and Worthington testified that he notified Long that he could not drive to work. The ALJ found Worthington's testimony to be more credible than Long's testimony. According to Worthington, he was unable to drive for a period of four months immediately following his injury.

¹ In the opinion, the ALJ characterized Worthington's injury as a scheduled injury. This is incorrect, because Worthington's injury is not permanent.

Long testified that the plan was for Worthington to return to his sales job, and Long also testified that he felt Worthington was capable of performing his job duties as a car salesperson despite the restrictions that Dr. Gilliam imposed upon Worthington. When asked whether Long was aware that a person was unable to bend his or her knee while wearing a knee immobilizer, Long replied, "That's really not my concern." Long stated that, in his experience, he had never observed a car salesman who performed his job while using crutches.

Long testified that even though the plan was to return Worthington to a sales position, Cavanaugh was willing to accommodate Worthington's restrictions. Long, however, stated that the accommodations were basically that Worthington could resume his regular sales job using crutches and wearing a knee immobilizer. Worthington's sales duties included walking the lot and accompanying customers who wished to test drive vehicles. Because Worthington worked on commission, it would be extremely difficult, if not impossible, for him to perform his duties adequately enough to earn a salary while wearing a knee immobilizer and using crutches. The ALJ found credible Worthington's testimony that he was physically incapable of resuming his regular sales job duties.

The job offer that Cavanaugh presented to Worthington was clearly not suitable, because Worthington was physically incapable of performing the job. Thus, it follows that Worthington did not reject an offer of suitable employment. As of the date of the hearing, Worthington was still in his healing period as he had not yet had surgery to repair the meniscus tear in his knee; therefore, the Commission's decision that Worthington is entitled to TTD benefits from July 13, 2004, to a date yet to be determined is supported by substantial evidence.

Affirmed.

GRIFFEN and VAUGHT, JJ., agree.